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No. 00- 001942 MAY 30 2001

In the Supreme Court of the United States

OFFICE OF THE CLERK

October Term, 2000

Evan S. Gutman,
Petitioner

v.

Loretta Gutman Francis,
Respondent

On Petition for a Writ of Certiorari
to the Supreme Court of the State of Oregon

PETITION FOR A WRIT OF CERTIORARI

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19 pp

QUESTION PRESENTED

Does the existence of the Oregon State Bar Professional Liability Fund (PLF) unconstitutionally infringe on a litigant's Fourteenth Amendment Due Process and Equal Protection Clause rights to a fair and impartial adjudication?

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Constitutional and Statutory Provisions:

Fourteenth Amendment to the U.S. Constitution
ORS 9.080

RULE 29.4(c) NOTICE

28 U.S.C. 2403(b) may apply as this proceeding calls into question the constitutionality of ORS 9.080. The Attorney General for the State of Oregon has been served with three copies of this Petition.

JURISDICTION

The Supreme Court of Oregon denied review on April 17, 2001. The jurisdiction of this Court is invoked under 28 USC 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution provides in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

ORS 9.080 the enabling statute for the PLF.

STATEMENT OF THE CASE

A. GENERAL SUMMARY

The fundamental question in this case is whether a State Bar violates the constitutional right of a litigant to receive a fair and impartial adjudication by requiring its' attorney members to purchase malpractice coverage directly from the State Bar under threat of suspension of their law license. Oregon is currently the only state with such an atrocious and unethical policy.

Petitioner is a licensed Pennsylvania and District of Columbia attorney. Petitioner has never practiced law, never been convicted of any crime in his entire life ("Contempt" is not a "crime" in Oregon), never been subjected to any professional disciplinary action and never had any ethical complaint ever filed against him dating back to his initial licensure as a CPA in 1985. Respondent is currently represented by her husband, William Francis an Oregon Family Law Attorney. Mr. Francis practiced law before the Judge that took away custody of the Petitioner's son in 1994, when he was a third year law student. Prior to trial and acting on his own, Petitioner filed a Motion to Disqualify the trial court judge based on taperecorded conversations in which Respondent indicated that she knew a Judge of the Court and also friends of the Judge and would therefore win. Petitioner lost custody of his child and as a result, did not get to see his only son grow up.

In 1999, Respondent instituted Contempt proceedings against Petitioner for failure to make a $ 125 monthly payment on an attorney fees judgment. Petitioner in response challenged the constitutionality of the Oregon State Bar Professional Liability Fund (PLF) in a Motion to Set Aside the underlying Judgment and a Motion to Quash Summons. The Motions were denied. Petitioner appealed solely and exclusively on the ground that the PLF was unconstitutional because it causes judicial rulings to be predicated on the best financial interests of the Oregon State Bar. The Court of Appeals declined to rule on the merits and the State Supreme Court denied review.

In November, 1999 the Oregonian Newspaper unleashed a barrage of negative publicity in an unrelated case against the Oregon State Bar PLF in

articles titled, "Malpractice fund scheme backfires" (November 14, 1999); "Ethical, legal and just plain reprehensible" (November 16, 1999); and "Did you hear the one about the state that allowed the Bar to control a fund for consumers hurt by unethical lawyers?" (November 17, 1999). A few days later, the Oregon State Bar issued a public letter of apology confessing to the fact that it had violated the general public's trust. (App-3). A few months later, the Director of the PLF resigned.

The existence of the Oregon State Bar PLF creates an undue economic influence, in violation of the Fourteenth Amendment and this Court's decision in Tumey v Ohio, 273 U.S. 510 (1927) that ultimately causes judicial rulings to be based on the best financial interests of the Oregon State Bar. It causes all Oregon Judges in all cases to be deprived of the cognitive ability to render fair and impartial adjudications. Due to the State Bar's letter of apology conceding the PLF violated the public's trust the Justices of the State Supreme Court could not condone it, so they declined to review this critically important issue that was presented to them.

B. DESCRIPTION OF THE PLF

The PLF is a program unique to the Oregon State Bar. Under the PLF, Oregon attorneys must purchase malpractice coverage directly from the State Bar or their law license is suspended. The same State Bar is vested with the disciplinary function, resulting in an atrocious conflict of interest.

The history of the PLF is disturbing. Apparently, it was enacted to neutralize the Oregon Supreme Court's opinion in *Sadler v. Oregon State Bar*, 275 Or. 279, 550 P.2d

1218 (1976) where at the request of the Attorney General, the Court held that disciplinary records of Oregon attorneys were public records. Once disciplinary complaints became public, Oregon attorneys were vulnerable and the PLF was enacted to frustrate malpractice lawsuits on their behalf. In 1977, the Oregon State Bar Board of Governors created the PLF, effective July 1, 1978 pursuant to ORS 9.080 which states in part:

> "The board shall have the authority to require all active members of the state bar engaged in the private practice of law . . . to carry professional liability insurance and shall be empowered, either by itself or in conjunction with other bar organizations, to do whatever is necessary and convenient to implement this provision, including the authority to own, organize and sponsor any insurance organization authorized under the laws of the State of Oregon and to establish a lawyer's professional liability fund. . . . Any fund so established shall not be subject to the Insurance Code of the State of Oregon."

Since it's inception, the PLF has been regularly challenged in the newspapers, and in litigation in at least the following cases, *State ex rel Robeson v. Oregon State Bar*, 291 Or. 505 (1981), *Balderee v. Oregon State Bar*, 301 Or. 155 (1986), *Hass v. Oregon State Bar*, 883 F.2d 1453 (9th Cir. 1989), and *Erwin v. Oregon State Bar and Its Board of Governors*, 149 Or.App. 99 (1997). Mr. Erwin was roughly 70 to 80 years old and a member of the Bar for roughly 40 to 50 years. The PLF has also been challenged in numerous cases not reaching the

appellate level. The published opinions involved challenges by Oregon attorneys and did not address how the PLF deprives litigants of their constitutional rights. The general public and the media will never accept the PLF. Designed as an experiment in the hope that other states would follow, no other states have been so foolish.

C. DUE PROCESS ANALYSIS

The crux of Petitioner's Due Process challenge is that provision of malpractice coverage by the State Bar conflicts with the disciplinary function thereby creating unconstitutional economic incentives to predicate Judicial Rulings on financial interests of the State Bar, rather than the law, facts and evidence. Litigants are consequently deprived of fair and impartial adjudications in violation of their Fourteenth Amendment rights.

Petitioner's right to an impartial adjudication was unconstitutionally infringed because the PLF diminished the likelihood of finding an Oregon attorney who would zealously represent him. Any Oregon attorney who zealously represented him would jeopardize State Bar financial interests, thereby placing their own professional status before the Bar at risk.

The PLF unconstitutionally infringes on a litigant's ability to obtain an impartial adjudication by placing an inordinate burden on the Oregon attorney. This occurs because the PLF creates a legal environment that penalizes Oregon attorneys for providing zealous representation. The provision of zealous representation increases the likelihood opposing counsel will be sued for malpractice. The few

zealous Oregon attorneys that exist are placed in a situation where by providing zealous representation they jeopardize State Bar financial interests. That same State Bar has disciplinary power over them. The State Bar has the perfect means at its disposal to get even with such an attorney, which is to subject them to unwarranted discipline. Similarly, the PLF creates economic incentives to unjustly reward attorneys who protect State Bar financial interests by treating them inordinately lenient in the context of discipline. The result is discipline for ethical, zealous representation, and an absence of discipline for unethical conduct.

The burden placed on Oregon attorneys unconstitutionally infringes the litigant's right to an impartial adjudication by creating economic incentives for judicial rulings to be predicated on whether a litigant's counsel protects State Bar financial interests by failing to provide zealous representation, or whether such counsel is a potential financial cost to the Bar by providing zealous representation. If the Court is faced with two Oregon attorneys on opposing sides of a case, both of whom protect State Bar financial interests, a unique situation occurs. There exists potential for the issue to actually be decided on the merits.

The PLF unconstitutionally infringes on a Pro Se litigant's ability to receive an impartial adjudication most acutely, by creating an irrational bias within the Judiciary against Pro Se litigants. Petitioner therefore had an unconstitutionally diminished likelihood of receiving a fair adjudication by exercising his right of self-representation. Competent Pro Se litigants represent an economic threat because they will file motions delineating procedural defects in pleadings of opposing counsel without hesitation. Such motions if

granted will result in opposing counsel being potentially liable for malpractice. Only in Oregon, does this result in the State Bar's financial interests being jeopardized, since malpractice coverage is provided by the PLF. This creates acute economic incentives to deny meritworthy motions filed by Pro Ses by falsely characterizing them as meritless.

In *Hass v. Oregon State Bar,* 883 F.2d 1453 (9th Cir. 1989) the PLF barely withstood scrutiny under the Sherman Antitrust Act by a narrow 2 -1 margin with even the majority holding it to be anticompetitive in nature and not action of the state within its sovereign capacity. The Ninth Circuit determined that while a state may not "do as it pleases," the enacting statute indicating the Bar could do whatever is "necessary and convenient" constituted a state policy anticipating the anticompetitive nature.

The Ninth Circuit however, in a remarkable deviation from the U.S. Supreme Court's holding in *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975) determined that a State Bar acting in a nonsovereign capacity could be immune from the Sherman Act. It accomplished this by dropping the "active supervision" requirement of *Parker immunity* for the Oregon State Bar.

A historic Dissent by Justice Ferguson noted the Oregon State Bar presented a poor candidate for exemption from the active supervision requirement since it brings its own set of economic interests to the playing field. He also noted the majority was confused regarding the hybrid nature of the State Bar and could not even decide what type of agency it was, referring to it in various parts of the opinion differently. Justice Ferguson writes as follows (emphasis added):

"The Bar's private interests in the very field in which it regulates – professional malpractice insurance – coupled with the lack of public accountability for its Fund-related activities, reveals that the Bar presents a poor candidate for exemption from the active supervision requirement.

. . .

Conspicuously absent from the majority's discussion is any acknowledgement of the potential for abuse when a state delegates regulatory authority to an organization, such as the Bar, which brings its own set of economic interests to bear on the regulated field. . . ."

"Indeed, the only two entities with direct authority over Fund operations are the Bar's Board of Governors and the Board of Directors of the Fund. . . . it would be a case of ***fox-watching-the-henhouse*** *to conclude that these two Boards could provide meaningful supervision over the Fund."*

Hass v. Oregon State Bar, 883 F.2d 1453 (9th Cir. 1989), Dissenting Opinion

Petitioner does not challenge the requirement that active, practicing members of the state bar carry malpractice insurance. Petitioner challenges the constitutionality of the policy that coverage be purchased directly from the "fox" (PLF), implemented under threat of suspending the attorney's license. The conflict of interest has caused the disciplinary process to become infected by State Bar monetary interests.

D. EQUAL PROTECTION CLAUSE ANALYSIS

Petitioner's inability to receive an impartial adjudication in violation of his Fourteenth Amendment procedural due process right, was heightened by how the PLF violated his right to equal protection of the laws. The Fourteenth Amendment to the Constitution provides:

> "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Equal Protection Clause directs that all persons similarly situated shall be treated alike. Plyler v. Doe, 457 U.S. 202 (1982). The PLF creates an irrational and impermissible class distinction that treats persons situated as "Oregon litigants" in a manner disadvantageous to those similarly situated as "litigants" in every other state. It furthers no compelling, substantial, legitimate or rational state interest, and is in fact irrational since it is designed to further the economic interests of the State Bar at the expense of the constitutional rights of the litigants.

Oregon litigants represented by counsel are treated in a disadvantageous manner compared to litigants in other states because the PLF creates improper economic incentives for such counsel to fail to raise valid objections on behalf of their clients, when an opposing party is represented by counsel, in order to protect each other from malpractice lawsuits. The concept is essentially a premise that "if you don't point

out my errors, then I won't point out yours and neither of us will be sued for malpractice."

Oregon litigants who represent themselves Pro Se are treated in a disadvantageous manner compared to Pro Se litigants in other states, because they represent a greater economic threat to the Bar. This occurs because the Competent Pro Se, will not hesitate to point out procedural deficiencies in pleadings of opposing counsel. Such counsel therefore has an increased probability of being sued for malpractice. Only in Oregon does this place State Bar financial interests at risk. An economic incentive is created to neutralize the State Bar's financial risk by denying meritworthy motions filed by Pro Se litigants, by falsely characterizing them as meritless.

In State v Balfour, 311 Or. 434 (1991), the Oregon Supreme Court wrote as follows (emphasis added):

> "Thus, we are **neither bound** nor relieved of our own duty in the matter by the United States Supreme Court's prior estimations of the proper ethical course of action. . . ."

In State v Kennedy, 295 Or. 260, 267, 666 P.2d 1316, 1321 (1983) the Court wrote (emphasis added):

> "Lest there be any doubt about it, when this court cites federal opinions in interpreting a provision of Oregon law, it does so because it finds the views there expressed persuasive, **not because it considers itself bound** to do so by its understanding of federal doctrines."

It is now left to this Court to determine whether the Justices of the Oregon Supreme Court are indeed correct that they are immune in ethical matters from

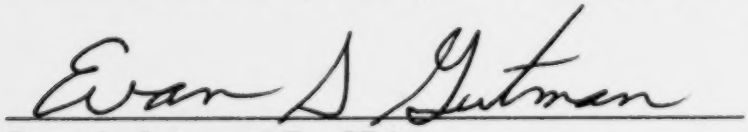
complying with the opinions of this Court as they have expressly asserted.

REASON FOR GRANTING THE WRIT

Pursuant to Rule 10(c) of this court, a state court of last resort has decided an important question of federal law that has not been, but should be settled by this court. The issue presented by this case will affect every single case, Judge, attorney, and litigant in the entire nation. The reason is as follows. Currently, only litigants in the State of Oregon are deprived of fair and impartial adjudications because no other state has adopted such an atrocious program as the PLF. This Court has previously denied review regarding whether the PLF violates the Sherman Antitrust Act. If this Court denies review regarding the Due Process and Equal Protection Clause Claim delineated herein, the PLF will have essentially passed the final hurdle necessary to promote the program on a nationwide basis. They will undoubtedly do so. Ultimately, other states probably will then follow, with the result being that litigants in those states will be deprived of fair and impartial adjudications.

For the foregoing reasons, Petitioner most respectfully requests that the Writ of Certiorari be granted.

Submitted most respectfully this 21st day of June, 2001.



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IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of the Marriage of	)	
	)	
EVAN S. GUTMAN	)	
Appellant/Petitioner	)	ORDER DENYING REVIEW
	)	
and	)	CA A109119
	)	SC S48134
	)	
LORETTA GUTMAN	)	
Respondent/Respondent	)	

The Court has considered the petition for review and orders that it be denied.

DATE: April 17, 2001

/S/ WALLACE P. CARSON JR.
WALLACE P. CARSON JR.
CHIEF JUSTICE

COPIES TO:

EVAN S. GUTMAN — Attorney for Appellant/Petitioner
WILLIAM FRANCIS — Attorney for Respondent/Respondent

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Marriage of EVAN S. GUTMAN,	)	
Petitioner-Appellant,	)	Marion County Circuit Court No. 93C-32566
and	)	
LORETTA GUTMAN, aka Loretta Gutman Francis, aka Loretta Jane Francis	)	ORDER DENYING MOTION TO DISMISS AND GIVING LEAVE UNDER ORS 19.270(4)
Respondent-Respondent	)	

Respondent has moved to dismiss this appeal on the grounds that the challenged order is not a final, appealable judgment. The motion is denied.

Appellant appeals from an "Order Finding Petitioner in Contempt of Court." Oregon law requires that the writing finally disposing of a case and from which an appeal is taken be titled "judgment." ORCP 70A; *City of Portland v Carriage Inn*, 296 Or 191, 673 P2d 531 (1983).

The writing from which this appeal is taken is an order rather than a judgment. However, the court determines that the trial court intended to enter a final judgment. In lieu of dismissing this appeal, the court on its own motion gives the trial court leave, on motion of any party, to enter a judgment. ORS 19.270(4).

If the trial court enters a judgment and appellant wishes to go forward with the appeal, appellant shall file an amended notice of appeal. The appeal will be held in abeyance pending the filing of the amended notice of appeal. After the filing of the amended notice of appeal, the appeal will proceed. The court will dismiss this appeal without further notice to the parties, for lack of prosecution, if the amended notice of appeal is not filed within the time allowed under ORS 19.255.

NOV 30 2000 /s/ Mary J. Deits

Date Chief Judge

c: William Francis
Evan S. Gutman
Marion County Circuit Court

Bar apologizes for being "just plain wrong"

By Larry Rew and Edwin Harnden

Over the past two weeks the Oregonian has given extensive coverage to a 1994 malpractice claim handled by the Professional Liability Fund (PLF) of the Oregon State Bar. The PLF is the malpractice insurance carrier for most Oregon lawyers in private practice. The claim at the center of the news coverage involved a strategy employed by the PLF in defending a claim. Essentially, the PLF established a shell company and secretly bought some outstanding debt owed by the plaintiffs in the malpractice claim. They used this shell company to try to force a settlement.

Oregonian reporter Jeff Manning did an excellent job of reporting this very complex case last Sunday. Columnist Steve Duin followed up on Tuesday with a column that was intensely critical of the bar and the fund, as was the lead editorial on Wednesday's editorial page.

The *Oregonian* got it right. While the "judgment acquisition" strategy does not violate any laws or legal ethics rules, it is still just plain wrong. It was wrong to use it then, and we will never use it again.

As leaders of the state bar, we accept full responsibility for the decision-making that transpired several years ago. The liability fund does have a separate board and director, but its operations are ultimately the responsibility of the state bar. We have two apologies to make: one to the public and one to our members.

To the public: It is our professional responsibility to maintain the integrity of Oregon's legal system. If you cannot trust your legal community, then you will never believe you have full access to your justice system.

To Oregon's lawyers: We have heard you loud and clear. You are justifiably outraged at our conduct. Unfortunately, you are paying the price financially and more important, with regard to the damage done to the reputation of lawyers everywhere.

The state bar has violated your trust. We are sorry.

While the intense scrutiny of this case is new to the public and to many of our members, it is not new to us. We addressed it in detail several years ago, when disciplinary complaints were first filed against several lawyers involved in the malpractice claim. The bar's Board of Governors addressed the issue again in a meeting last weekend and will meet jointly today with the PLF's board.

We have taken numerous actions. First, several years ago we made it a matter of policy that this secret judgment acquisition strategy would never again be used. Second, we have re-examined our organization's values, which include integrity, fairness, and respect for the rule of law, and made it a policy that our Board of Governors review all types of strategies used by the PLF to ensure that they are aligned with those values. Third, we have increased our oversight of PLF operations, and are confident that what happened four years ago would not happen today. Finally, the PLF Board itself has committed to a closer monitoring of its defense attorneys.

It is particularly unfortunate that this incident has clouded what is a remarkable achievement: the lawyers of this state, and only this state, pay a substantial amount of money each year to provide a layer of coverage for legitimate claims of malpractice. The responsibility for the fact that those achievements are now of only passing notice rests squarely on the shoulders of the state bar membership.

This has been an ugly episode in the history of our organization. We are proud, however, of our membership for the collective voice we heard from them this week. Their criticism this week attests to the integrity with which they live, and the ideals to which they - and the public - hold us. We will do our very best to live up to those ideals in the future.

Larry Rew of Pendleton and Edwin Harnden of Portland are the President and President-elect of the Oregon State Bar.